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No. 96-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANIS KOKOSKA, BY HER GUARDIAN JOHN KOKOSKA,
Petitioner,

v.

BRUCE M. BULLEN, COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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31 pp

Questions Presented

1. Whether the Massachusetts Division of Medical Assistance ("Division") correctly determined that a trust was a "Medicaid qualifying trust" pursuant to 42 U.S.C. § 1396a(k) (1986) (the "Medicaid qualifying trust statute" or "MQT" statute), where the trust was established by the trust beneficiary acting through a conservator, with funds owned by the beneficiary, and where the trustee in certain circumstances had discretion to disburse the entire trust assets to the beneficiary?

2. Whether the Division correctly determined, pursuant to the MQT statute, that the full amount of assets in a Medicaid qualifying trust were available to the trust beneficiary, for the purposes of determining the beneficiary's eligibility for Medicaid benefits, where the trustee's discretion to disburse the trust assets was limited only to the extent that such disbursement would render the beneficiary ineligible for Medicaid benefits, and where the trustee otherwise had complete discretion to disburse the entire trust assets on behalf of the beneficiary?

Parties to the Proceeding.

The parties to the proceeding in the Massachusetts Supreme Judicial Court are as follows:

Janis Kokoska, by her guardian John Kokoska, plaintiff-appellant in the Supreme Judicial Court, is the petitioner in this Court. The defendant-appellee in the Massachusetts Supreme Judicial Court is Bruce M. Bullen, the Commissioner of the Massachusetts Division of Medical Assistance, the respondent in this Court.

The *Kokoska* case and three other cases presenting similar issues concerning application of the Medicaid qualifying trust statute were argued jointly in the Supreme Judicial Court, and that court rendered one decision governing all four cases. The cases were never consolidated, however, and the parties to the other three cases therefore are not identified here.

Table of Contents.

TABLE OF AUTHORITIES ii

DECISION BELOW 2

JURISDICTION 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE SUPREME JUDICIAL COURT'S HOLDING THAT A TRUST ESTABLISHED BY A CONSERVATOR IS A MEDICAID QUALIFYING TRUST IS NOT IN CONFLICT WITH ANY DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR DECISIONS OF THE UNITED STATES COURTS OF APPEALS. 7

II. THE SUPREME JUDICIAL COURT'S HOLDING THAT ALL OF THE TRUST ASSETS WERE AVAILABLE FOR THE PURPOSES OF DETERMINING MEDICAID ELIGIBILITY IS CONSISTENT WITH BOTH THE LANGUAGE AND PURPOSE OF 42 U.S.C. § 1396a(k), AND A 1993 AMENDMENT TO THE STATUTE MAKES THE ISSUE PRESENTED IN THE PETITION ONE OF LIMITED APPLICABILITY. 12

CONCLUSION 20

APPENDIX A-1

Table of Authorities.

Cases.

Barham v. Rubin, 72 Haw. 308,
816 P.2d 965 (1991) 8

Chevron U.S.A. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 15, 16

Forsyth v. Rowe, 226 Conn. 818,
629 A.2d 379 (1993) 8, 9, 11-12

Forsyth v. Rowe, 1995 WL 152124
(Conn. Super. 1995) 19

Frerks v. Shalala, 52 F.3d 412
(2d Cir. 1995) 11 n.3

Hatcher v. Department of Health & Rehabilitative Servs., 545 So. 2d 400,
(Fla. Dist. Ct. App. 1989) 19

Helvering v. N.Y. Trust Co.,
292 U.S. 455 (1934) 17-18 n.8

Hughes v. Physicians Hospital,
149 Misc.2d 661,
566 N.Y.S.2d 496 (Super. Ct. 1991) 11 n.3

In re Woods,
143 U.S. 202 (1892) 6

Kegel v. State, 113 N.M. 646,
830 P.2d 563 (Ct. App. 1992) 10

Matter of Kindt, 542 N.W.2d 391
(Minn. Ct. App. 1996) 8, 9, 10, 18-19

Miller v. Ibarra, 746 F. Supp. 19
(D. Colo. 1990) 5, 9

Mills v. Durst, 156 Misc. 2d 676,
594 N.Y.S.2d 537 (Sup. Ct. 1993) 11

Navarro v. Sullivan, 751 F. Supp. 349
(E.D.N.Y. 1990) 11 n.3

Romo v. Kirschner, 181 Ariz. 239,
889 P.2d 32 (Ct. App. 1995) 8

Ronney v. Department of Social Servs.,
210 Mich. App. 312,
532 N.W.2d 910 (1985) 19

Thomas v. Arkansas Dep't of Human Servs.,
319 Ark. 782, 894 S.W.2d 584
(1995) 8

*Trust Co. v. State ex rel. Dep't of
Human Servs*, 825 P.2d 1295
(Okla. 1991), *cert. denied*,
506 U.S. 906 (1992) 5, 10

Williams v. Kansas Dep't of Social & Rehabilitation Servs., 258 Kan. 161, 899 P.2d 452 (1995) 8, 10, 12, 19

Young v. Department of Pub. Welfare, 416 Mass. 629, 624 N.E.2d 110 (1993) 4

Statutes, Regulations and Court Rules.

28 U.S.C. § 1257 2

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1257(l) 2

42 U.S.C. § 1396a(k) (1986) 2-3, 7, 11-12

42 U.S.C. § 1396a(k)(1) 13-14

42 U.S.C. § 1396a(k)(2) 7-8, 12

42 U.S.C. § 1396a(k)(3B) 13-14, 14 n.4

42 U.S.C. § 1396a(k)(4) 18 n.9

42 U.S.C. § 1396p(d) (1993) 6-7

42 U.S.C. § 1396p(d)(3)(B) 17 n.8

106 C.M.R. § 505.160(K)(2) (1991) 5 n.1

130 C.M.R. § 505.160(J)(3) (1995) 5 n.1

130 C.M.R. §§ 506.600-506.620 (1994) 9 n.2

Supreme Court Rule 10 6

Supreme Court Rule 10(b) 2, 6

Supreme Court Rule 10(c) 12-13

Supreme Court Rule 15 1

Miscellaneous.

Health Care Financing Administration, Department of Health and Human Services, *State Medicaid Manual* (May 1989) 12

House Committee on Energy and Commerce, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1 (1985) 16-17

2B Norman J. Singer, *Sutherland Statutory Construction* (5th ed. 1992) 15

Robert L. Stern et al., *Supreme Court Practice*, (7th ed. 1993) 5-6 n.1

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Commissioner of the Massachusetts Division of Medical Assistance ("Commissioner") submits this brief in opposition to the petition for writ of certiorari ("Pet.") filed by the petitioner-beneficiary Janis Kokoska ("beneficiary").

Decision Below

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages App.1-App.40 of the appendix to the petition ("Pet. App."), is reported at 423 Mass. 399, 668 N.E.2d 769 (1996).

Jurisdiction

The Commissioner does not contest this Court's jurisdiction pursuant to 28 U.S.C. § 1257, but notes that jurisdiction lies under 28 U.S.C. § 1257(a), rather than 28 U.S.C. § 1257(1) as asserted at page 1 of the petition.

Contrary to the statement of jurisdiction in the petition, the reasons set forth in Supreme Court Rule 10(b) for granting review on a writ of certiorari do not apply here, as there is no conflict between the decision of the Massachusetts Supreme Judicial Court and the decision of another state court of last resort or a United States court of appeals.

Relevant Statutes

The Medicaid qualifying trust statute, 42 U.S.C. § 1396a(k) (1986), provides:

> (1) In the case of a medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of

the previous sentence, the term "grantor" means the individual referred to in paragraph (2).

(2) For purposes of this subsection, a "medicaid qualifying trust" is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

(3) This subsection shall apply without regard to--
(A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title; or
(B) whether or not the discretion described in paragraph (2) is actually exercised.

Statement of the Case

This case arises from the use of *inter vivos* trusts by certain persons seeking to preserve their assets for their (or their heirs') future use while at the same time ensuring their eligibility for Medicaid benefits. In response, Congress in 1985 enacted the MQT statute, intending thereby to eliminate the practice of using such trusts to ensure Medicaid eligibility, by providing that the assets in such "Medicaid qualifying trusts" be deemed "available" resources for the purposes of determining eligibility for benefits. Following enactment of the MQT statute, the Division discontinued the beneficiary's Medicaid

benefits on the basis that the trust of which she was a beneficiary was a Medicaid qualifying trust and that the assets available to her under the trust exceeded the limits for Medicaid eligibility.

An accurate statement of the case appears in the opinion of the Supreme Judicial Court of Massachusetts at App. pp. 4-13 and 33-36. However, the petition is inaccurate in several respects.

1. The beneficiary places undue emphasis on language in the trust purporting to limit the trustee's discretion, citing a decision by the Massachusetts Probate and Family Court ("Probate Court") instructing that the trustee had no discretion to make payments that would render the beneficiary ineligible for Medicaid benefits. Pet. pp. 3-4. But as the beneficiary herself concedes, and as the Supreme Judicial Court explicitly noted both in this case and in the appeal of the determination of the Probate Court, *see Young v. Department of Pub. Welfare,* 416 Mass. 629, 634, 624 N.E.2d 110, 113 (1993), the Probate Court's decision was not determinative of the issue of Medicaid eligibility, and the Division of Medical Assistance ("Division") was not bound by the Probate Court judgment. Pet. App. p. 36.

Moreover, as the Supreme Judicial Court noted, the terms of the trust gave the trustee broad discretion to pay both trust income and principal to the beneficiary for a wide range of purposes, "limiting that discretion only to assure Kokoska's eligibility for public assistance in spite of the resources otherwise available to her." Pet. App. p. 36. Because the trustee had discretion to disburse the entire trust assets to the beneficiary in the circumstances in which her eligibility for benefits was not assumed, the Supreme Judicial Court correctly

determined that the entire trust assets should be considered available under the MQT statute.

2. The petition mischaracterizes the opinion of the Supreme Judicial Court, stating that the opinion "acknowledged the split among the states on the issue presented in this petition, citing Arizona, Arkansas, Connecticut, Hawaii, Kansas and Minnesota as holding that conservator-established court-authorized trusts are Medicaid Qualifying Trusts (MQTs), but acknowledged that Oklahoma, Colorado (United States District Court opinion), New Mexico and New York had ruled that such trusts are not MQTs." Pet. p. 6. In fact the Supreme Judicial Court cited decisions from courts in all of the foregoing jurisdictions, but referred to only two of those decisions as comparing unfavorably with the Supreme Judicial Court's conclusion that a trust established by a beneficiary acting through a conservator may be a Medicaid qualifying trust. Both of those decisions, *Miller v. Ibarra,* 746 F. Supp. 19, 33-34 (D. Colo. 1990), and *Trust Co. v. State ex rel. Dep't of Human Servs.*, 825 P.2d 1295, 1302-1303 & n.31 (Okla. 1991), *cert. denied*, 506 U.S. 906 (1992), are distinguishable, as are all of the other cases cited in the petition as "conflicting." *See Argument Section I.*[1]

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[1] The petition notes the Division's determination that the beneficiary was not a resident of an intermediate care facility for the mentally retarded and therefore did not qualify for an exception from the state regulations governing Medicaid qualifying trusts pursuant to 106 C.M.R. § 505.160(K)(2) (1991). Pet. p. 5. That regulation, now set forth at 130 C.M.R. § 505.160(J)(3) (1995), provides that trusts established prior to April 7, 1986 solely for the benefit of a resident of an intermediate care facility for the mentally retarded are excluded

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Such a writ is to be granted "only for compelling reasons." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892).

Contrary to petitioner's assertion, the Supreme Judicial Court has not decided an important federal question "in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10(b). The state court decisions cited in the petition do not conflict with the decision of the Supreme Judicial Court but rather are distinguishable, as is a federal case cited in the petition as conflicting and which, in any event, was decided by a district court and not by a court of appeals.

Moreover, in 1993 Congress amended the Social Security Act by repealing the MQT statute and adding new trust

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from the regulations implementing the MQT statute. While the petition appears to take issue with that determination, it is not discussed in the Argument section of the petition. The beneficiary similarly did not properly present that issue in her brief below (mentioning it only in passing in a footnote), and the opinion of the Supreme Judicial Court does not address it. For that reason (and because the issue is one of state law only), this Court lacks jurisdiction to consider the issue. *See generally* Robert L. Stern et al., *Supreme Court Practice* § 3.17, at 122 (7th ed. 1993) (collecting authorities).

provisions to 42 U.S.C. § 1396p(d) (1993). The amendment, which governs trusts established after August 10, 1993, "resolves in favor of the Commonwealth [*i.e.*, the Commissioner] beyond any possibility of argument the issue presented in these cases: if, in any circumstances any amount of money might be paid to a beneficiary, the maximum of such amount is deemed to be available to the beneficiary." Pet. App. pp. 12-13. Thus, the question presented in the petition, concerning the proper interpretation of the 1986 MQT statute (which now governs only those trusts established on or before August 10, 1993), involves an issue of limited applicability and of diminishing importance as time passes.

As the petition does not satisfy the traditional criteria which guide the Court's discretionary review, it should be denied.

I. THE SUPREME JUDICIAL COURT'S HOLDING THAT A TRUST ESTABLISHED BY A CONSERVATOR IS A MEDICAID QUALIFYING TRUST IS NOT IN CONFLICT WITH ANY DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

The petition seeks certiorari review on the ground that the Supreme Judicial Court's decision conflicts with other decisions concerning whether a trust established by a conservator is a Medicaid qualifying trust under 42 U.S.C. § 1396a(k). Because the Supreme Judicial Court's decision is not in conflict with any of the decisions cited in the petition, review by this Court is not warranted.

1. Section 1396a(k)(2) of the Medicaid qualifying trust statute defines a Medicaid qualifying trust as a trust established

by an individual or spouse under which the individual may be the beneficiary of all or part of the payments from the trust. Pet. App. p. 36. The beneficiary reiterates her argument that the statute does not apply to her trust since it was not her, but her conservator, who established the trust, doing so pursuant to a decree of the Probate Court. Pet. pp. 8-10; Pet. App. pp. 36-37. The Supreme Judicial Court correctly rejected the argument, noting decisions in other jurisdictions that have treated trusts established by a conservator or guardian as MQTs. Pet. App. p. 37 (citing *Romo v. Kirschner*, 181 Ariz. 239, 241-243, 889 P.2d 32, 34-35 (Ct. App. 1995) (trust established by conservator and approved by court using proceeds from personal injury action held to be MQT); *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 789, 894 S.W.2d 584, 589 (1995) (trust established by guardian using settlement proceeds from workers' compensation claim held to be in violation of state statute prohibiting MQTs); *Forsyth v. Rowe*, 226 Conn. 818, 826-828, 629 A.2d 379, 384-385 (1993) (trust established by individual acting through conservator held to be MQT); *Barham v. Rubin*, 72 Haw. 308, 309-313, 816 P.2d 965, 966-967 (1991) (trust established by probate court using settlement proceeds from personal injury action on behalf of plaintiff held to be MQT); *Williams v. Kansas Dep't of Social & Rehabilitation Servs.*, 258 Kan. 161, 166-172, 899 P.2d 452, 456-459 (1995) (trust established by guardian on behalf of beneficiary, using settlement proceeds from personal injury action, held to be MQT); *Matter of Kindt*, 542 N.W.2d 391, 396-399 (Minn. Ct. App. 1996) (trust established by guardian on behalf of incompetent individual from proceeds of personal injury settlement held to be MQT)).

Moreover, the only cases cited in the petition as conflicting with the Supreme Judicial Court's decision are distinguishable from it. *Miller v. Ibarra*, 746 F. Supp. 19 (D.

Colo. 1990), a district court decision, held that trusts approved by Colorado probate courts in favor of four elderly, mentally incompetent nursing home patients were not MQTs because they were not created by the Medicaid beneficiary. *Miller* is distinguishable because of the fact that assets remaining after the death of the beneficiaries would be transferred to the Colorado Department of Social Services, *not* to the beneficiaries' heirs, demonstrating that the trusts in *Miller* were not designed to frustrate the purpose of the MQT statute. 746 F. Supp. at 33-34. *See Forsyth v. Rowe*, 226 Conn. at 826-827 n.12, 629 A.2d at 384-385 n.12 (noting that holding in *Miller* rested on trusts' remainder provisions designating public agency rather than private heirs as residual beneficiaries); *Matter of Kindt*, 542 N.W.2d at 397 (noting that *Miller* involved exceptional circumstances in that trusts preserved remainder of trust assets for the state). [2] In contrast, under the terms of the beneficiary's

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[2] *Miller* also is distinguishable in that the holding was "premised on [the] unfairness of Colorado's 'Utah Gap' rule . . . ." Pet. App. p. 37 n.26. The "Utah Gap" refers to the disqualification of the *Miller* beneficiaries from eligibility for Medicaid payments for nursing home expenses even when their expenses far exceeded their assets. 746 F. Supp. at 20. As the Supreme Judicial Court noted, Massachusetts (unlike Colorado), participates in a federal program that provides funds to bridge the "Utah Gap," under which the medically needy are not totally disqualified from medicaid benefits if their income and assets exceed the eligibility limit. Pet. App. at pp. 37-38 n. 26. Rather, they become eligible when they incur expenses that reduce their income to the eligibility level. 130 C.M.R. §§ 506.600-506.620 (1994). Finally, in *Miller* the trustees' discretion to disburse trust assets was limited to an amount $20.00 less than the Colorado Medicaid income eligibility level,

trust, the remainder of the trust would go the beneficiary's heirs not to the state. North Chelmsford Trust, Article 4 (reproduced at Opp. App. pp. A-1 through A-2).

Trust Co. Of Oklahoma v. State ex rel. Dep't of Human Servs., 825 P.2d 1295, 1302-1303 n.31 (1991), *cert. denied*, 506 U.S. 906 (1992), merely noted in a footnote, without any analysis, that the trust in question was not an MQT because the grantor of the trust was the tortfeasor rather than the beneficiary, and the court on that basis distinguished its holding from other cases finding trusts to be MQTs. *Trust Co.* in any event is of limited precedential value due to its cursory treatment of the issue. *See, e.g., Matter of Kindt,* 542 N.W.2d at 397 (the holding in *Trust Co.* "resulted from what appears to have been a casual statement regarding a collateral issue"); *Williams v. Kansas Dep't of Social Servs. & Rehabilitation*, 258 Kan. at 171, 899 P.2d at 458-459 (failure of *Trust Co.* to address MQT issue more extensively limits its persuasiveness).

The remaining cases characterized in the petition as "conflicting" with the Supreme Judicial Court's decision also are distinguishable. *See Kegel v. State*, 113 N.M. 646, 830 P.2d 563 (Ct. App. 1992) (seven year old beneficiary never had unrestricted legal or equitable title to proceeds of tort settlement because settlement was paid to parents and child jointly, with no distinction as to which portion of settlement belonged to whom; trust therefore would not be considered MQT because record was insufficient to determine that child was person who

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746 F. Supp. at 27, so that even if the trusts were found to be MQTs, the applicants would still have been eligible for Medicaid. In contrast, the trustee in the instant case had discretion to disburse the entire trust assets. Pet. App. p. 36.

established trust); *Mills v. Durst*, 156 Misc. 2d 676, 594 N.Y.S. 2d 537 (Sup. Ct. 1993) (where child never had legal right to settlement funds before they were placed in trust, trust would not be considered self-settled under state law). Here, in contrast, the proceeds of the beneficiary's malpractice settlement "were plainly her assets in that they were used for her support for approximately eighteen years before being placed in trust . . . ." Pet. App. p. 38. Moreover, the trust itself refers to the beneficiary as the settlor, acting "by her conservator." Pet. App. pp. 38-39.[3]

2. The Supreme Judicial Court's conclusion that a trust established by a conservator acting on behalf of a beneficiary is a MQT is consistent with the purpose of the MQT statute. As the court in *Forsyth v. Rowe* explained,

> It is clear . . . from the purpose and history behind § 1396a(k) that a medicaid qualifying trust may also be "established . . . by an individual" when that individual,

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[3] *Mills v. Durst* does not conflict with *Frerks v. Shalala*, 52 F.3d 412 (2d Cir. 1995), as asserted at Pet. pp. 9-10 n.1. In *Frerks* the court rejected the plaintiffs' request to transfer settlement assets to a trust and noted that trust funds would in any event be available under the MQT statute. *Navarro v. Sullivan*, 751 F. Supp. 349 (E.D.N.Y. 1990) and *Hughes v. Physicians Hospital*, 149 Misc. 2d 661, 566 N.Y.S.2d 496 (Super. Ct. 1991) also cited in the petition, at Pet. p. 8, are not on point. *Navarro* and *Hughes* both involved a determination of eligibility for Supplemental Security Income benefits under the analogous regulations adopted by the Social Security Administration governing available "resources," but neither decision addressed or analyzed the MQT statute.

> acting through his conservator, provides the consideration for the trust. . . . It would be anomalous to construe the statute to allow a medicaid applicant to accomplish through a conservator or guardian acting on his behalf what the law prevents that applicant from doing on his own.

226 Conn. at 827-828, 629 A.2d at 384-385. *See also Williams v. Kansas Dep't of Social and Rehabilitation Servs.*, 258 Kan. at 166, 899 P.2d at 456 (implicit in the term "individual" as it appears in § 1396a(k)(2) is a person acting as the individual's legal representative where the individual is incapable of acting on his or her own); *see also* Health Care Financing Administration, Department of Health and Human Services, *State Medicaid Manual*, § 3215.1 (May 1989) ("A trust that is established by an individual's guardian or legal representative acting on the individual's behalf, falls under the definition of a Medicaid qualifying trust"), cited at Pet. App. p. 38.

II. THE SUPREME JUDICIAL COURT'S HOLDING THAT ALL OF THE TRUST ASSETS WERE AVAILABLE FOR THE PURPOSES OF DETERMINING MEDICAID ELIGIBILITY IS CONSISTENT WITH BOTH THE LANGUAGE AND PURPOSE OF 42 U.S.C. § 1396a(k), AND A 1993 AMENDMENT TO THE STATUTE MAKES THE ISSUE PRESENTED IN THE PETITION ONE OF LIMITED APPLICABILITY.

The petition does not assert any conflict between decisions of other state or federal courts and the Supreme Judicial Court's holding that all of the beneficiary's trust assets were available for the purpose of determining Medicaid eligibility. Nor does this issue involve "an important question of federal law that has not been, but should be, settled by this

Court," Supreme Court Rule 10(c). As noted above, a 1993 amendment to the MQT statute (applicable to all trusts established after August 10, 1993) clarified Congress' intention that limitations on a trustee's discretion to disburse trust assets be disregarded for purposes of determining Medicaid eligibility. Pet. App. pp. 12-13. The issue presented in the petition concerning the proper interpretation of the 1986 MQT statute (applicable only to trusts established on or before August 10, 1993) with respect to the amount of a trust beneficiary's resources deemed "available" thus is of limited applicability and does not present an important question of national significance warranting this Court's review.

1. The petition asserts that the Supreme Judicial Court's decision does not comport with the plain language of the Medicaid qualifying trust statute. Pet. pp. 11-15. The petition does not provide any persuasive authority in support of this assertion, however, but instead merely repeats the language of the statute and concludes that, because under the terms of the trust the trustee has no discretion to pay monies that would make the beneficiary ineligible for benefits, the trust assets are not "available" to the beneficiary for the purpose of assessing her eligibility. Pet. pp. 11-15. This argument, which ignores that the federal MQT statute (not the trust language) governs the determination of Medicaid eligibility, is not consistent with the plain language of the statute or its purpose.

Under the statute, the Division was required, in determining the beneficiary's "available" resources, to consider:

> the maximum amount of payments that *may be permitted* under the terms of the trust *to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum*

> *amount to the grantor. . . . whether or not the [trustees'] discretion . . . is actually exercised . . . .*

42 U.S.C. § 1396a(k)(1) and (3)(B) (emphasis added). The foregoing language is read most naturally as the Supreme Judicial Court read it, *i.e.*, that the amount of assets deemed available is "the greatest amount that the trustees in any set of circumstances might have discretion to pay out to the beneficiary. Thus, if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility." Pet. App. p. 23.[4] Applying that language to the terms of the beneficiary's trust, the trustee clearly had discretion to distribute the entire trust assets on the beneficiary's behalf in the circumstances in which she was not Medicaid-eligible. Pet. App. pp. 33-35.[5] In other words, because the limit on the

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[4] As noted above, under the MQT statute it is the *existence* of the trustee's discretion rather than the *exercise* of that discretion that is relevant to the determination of "available" assets. *See* 42 U.S.C. § 1396a(k)(3B).

[5] The Probate Court determined that under the terms of the trust "the trustee's discretion is limited to making distributions which are supplemental to benefits, including Medicaid benefits, to which Kokoska is entitled . . . that the trustee is not permitted to exercise any discretion if that exercise of discretion would render Kokoska ineligible to receive such benefits; and that, if Kokoska is ineligible to receive benefits for reasons other than the exercise of the trustee's discretion to make payments, then the trustee may make such payments for Kokoska's supplemental care and welfare." Pet. App. p. 35.

trustee's discretion was predicated on an assumption of Medicaid eligibility, and because the trustee otherwise had discretion to disburse the trust assets in their entirety, the Division properly concluded that the amount of the trust deemed "available" was the entire trust assets. Pet. App. p. 36.[6]

The interpretation of the statute given by the Health Care Financing Administration ("HCFA"), the agency within the United States Department of Health and Human Services that is charged with administration of the Medicaid program, also supports the Supreme Judicial Court's decision. In response to an inquiry from the Division, the HCFA sent a letter, dated July 11, 1991, explaining that "exculpatory clauses" (clauses of MQTS that limit "the authority of a trustee to distribute funds from a trust if such distribution would jeopardize eligibility for government programs, including Medicaid") should be disregarded for purpose of determining Medicaid eligibility. Pet. App. p. 18 n.17. This administrative interpretation of the MQT statute, although not embodied in a regulation, *see* Pet. App. p. 19-20 n.18, nevertheless is entitled to some deference. *See* 2B Norman J. Singer, *Sutherland Statutory Construction*, § 49.05 at 17-18, 20; § 49.06 at 59 (5th ed.1992). *See also Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-845 (1984) (agency's reasonable interpretation of

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[6] The fact that the exercise (or even the existence) of the trustee's discretion is made contingent on the beneficiary's ineligibility for Medicaid does not mean that, for the logically prior purpose of determining Medicaid eligibility, the trustee does not possess discretion or that such discretion must be ignored. A contrary holding would, in effect, allow grantors of trusts to make their own Medicaid eligibility rules.

statute is entitled to deference).[7]

2. This reading of the statute is consistent with its purpose and history. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 842-843 (when construing a statute, court must give effect to clear Congressional intent). In enacting the MQT statute, Congress intended to eliminate the practice whereby Medicaid applicants sought to use *inter vivos* trusts to shield their assets and qualify for Medicaid benefits. The House Committee on Energy and Commerce, recommending passage of the bill containing the MQT statute, stated:

> The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the

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[7] The beneficiary erroneously suggests that the Division agreed with her interpretation of the statute for several years after its enactment in 1985, since it continued to find her eligible to receive benefits until 1991. Pet. p. 13. Rather, following enactment of the MQT statute, the Division undertook a review of all Medicaid recipient cases to redetermine eligibility based on changes in the law. As part of that review, the Division became aware of the beneficiary's trust and thereafter determined that the trust assets were available to her for purposes of the statute. Pet. App. p. 35.

Committee.

House Committee on Energy and Commerce, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 71-72 (1985). *See also* Pet. App. pp. 6-8 (Supreme Judicial Court noted use of trust device by which a person would "place his or her assets in trust so that those assets would provide for that person's comfort and well being, maybe even leaving something over to pass on his or her death, while creating eligibility for public assistance," and discussing legislative response to this practice by enactment of MQT statute).[8]

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[8] The petition erroneously asserts that the Supreme Judicial Court ignored the plain language of the statute and placed too much reliance on legislative history, in particular the Committee Report. Pet. pp. 15-16. In fact the Supreme Judicial Court emphasized that its decision was based on the text of the statute, *see* Pet. App. p. 20 ("It is the text of the statute itself that leads to the conclusion that the grantors in all of these cases cannot render themselves eligible for Medicaid assistance by these devices.")

Moreover, in considering the legislative history of the 1986 MQT statute the Supreme Judicial Court found inconclusive the 1993 amendment clarifying that "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual," the portion of trust corpus or income from which payment could be made "shall be considered resources available to the individual . . . ." 42 U.S.C. § 1396p(d)(3)(B); Pet. App. pp. 12-13. But while the Supreme Judicial Court declined to rely on the 1993 amendment as evidence of Congress' intent underlying the 1986 statute, the 1993 amendment merely clarified what was already existing

The beneficiary incorrectly suggests that the statute was directed only at wealthy individuals and should not be applied to disabled persons. Pet. pp. 16-17. But the petition points to nothing in the statute indicating a legislative intent to limit the reach of the statute in this manner. *See Matter of Kindt*, 542 N.W.2d at 398 ("while Congress felt particular animosity towards prosperous individuals who engaged in this practice [sheltering assets for the potential benefits of heirs], it enacted the 1986 law to prevent *anyone*, regardless of affluence, from gaining [medical assistance] benefits by placing assets into a trust that might eventually fall to the settlor's heirs.") (emphasis in original)[9]

3. Courts in other jurisdictions that have addressed the determination of "available" resources under the MQT statute similarly have held that for purposes of determining Medicaid eligibility, trust assets are available to grantors where the trustee has discretion to use the assets for the beneficiary in circumstances where the beneficiary is not eligible for Medicaid benefits. *Matter of Kindt*, 542 N.W.2d at 399 (assets of MQT available to beneficiary insofar as trustee had discretion to

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law, and thus supports the Supreme Judicial Court's conclusion. *See Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468-469 (1934) ("Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law.").

[9] The 1986 statute provided that states "may" waive the application of the statute with respect to an individual based on undue hardship, *see* 42 U.S.C. § 1396a(k)(4), but Massachusetts did not adopt such a hardship exception.

distribute trust assets in absence of beneficiary's eligibility for medical assistance benefits); *Williams v. Kansas Dep't of Social & Rehabilitation Servs.*, 258 Kan. at 172-173, 899 P.2d at 460 (trust assets deemed available under MQT statute because trustee had discretion to pay amounts for beneficiary's support in circumstances where beneficiary was ineligible for Medicaid); *Ronney v. Department of Social Servs*, 210 Mich. App. 312 , 321, 532 N.W.2d 910, 914 (1985) (affirming agency's determination that value of MQT was countable asset in determining applicant's eligibility for Medicaid); *Hatcher v. Department of Health & Rehabilitative Servs.*, 545 So. 2d 400, 402 (Fla. Dist. Ct. App. 1989) (assets in MQT were properly considered for purposes of determining Medicaid eligibility notwithstanding trust purpose of supplementing public assistance); *Forsyth v. Rowe*, 1995 WL 152124 (Conn. Super. 1995) (upon remand from Connecticut Supreme Court, superior court held that entire trust assets were available for purpose of determining Medicaid eligibility, notwithstanding trust language providing that trust be used only to supplement public benefits).

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: December 5, 1996

APPENDIX TO BRIEF IN OPPOSITION

North Chelmsford Trust, Article 4

ARTICLE FOUR

TERMINATION OF TRUST

Upon the death of the Primary Beneficiary, if termination of this Trust has not previously occurred, this Trust shall terminate, and the Trustee shall pay the reasonable funeral and burial expenses of the Primary Beneficiary, if they have not otherwise been provided for, and shall distribute the balance of such property to such person or persons in such amounts and manner as the Primary Beneficiary may appoint by her will, making specific reference to the power contained in this instrument.

To the extent that the Primary Beneficiary fails to exercise this power of appointment, the Trustee shall distribute such property to those persons who would inherit the Primary Beneficiary's property if he or she had died intestate, domiciled in Massachusetts, free of all debts, and possessed only of such unappointed Trust property.

Notwithstanding any other provisions in this Instrument, the Trustee may at any time terminate this Trust whenever he determines that it is not in the Primary Beneficiary's best interests to continue the Trust, whether because it would be uneconomical to so continue or for any other reason. In such event, the Trustee shall distribute the remaining principal and income of the Trust in his discretion to the guardian or conservator legally appointed for the Primary Beneficiary, or if there is no guardian or conservator, to the presiding judge of a probate court with personal jurisdiction over the Primary

Beneficiary, or directly to the Primary Beneficiary.

This Trust shall in no event be terminated at the request of the Primary Beneficiary, but only in the discretion of the Trustee.

Upon the termination of this Trust during the life of the Primary Beneficiary, the Trustee shall notify in writing the Massachusetts Department of Mental Health and the superintendent or director of any facility or program operated by the Department of Mental Health or under its control or supervision in which the Primary Beneficiary then resides or participates.